

**United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001**

'Notice: This is an electronic bench opinion which has not been verified as official'

Date: July 22, 1997

CASE NO. 95 INA 486

In the Matter of:

COLUMBIA BAKERY,
Employer

on behalf of

MANUEL MARUJO CASANOVA,
Alien

Appearance: M. F. Alper, Esq., Irvington, New Jersey

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Manuel Marujo Cassanova (Alien) by Colombia Bakery (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at Boston, Massachusetts, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.¹

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On March 21, 1994, Employer applied for employment certification on behalf of the Alien to fill the position of Specialty Baker. It stated the minimum requirements for the position as two years of experience in the job offered and fluency in Portuguese. AF 104-105. In conjunction with its application, Employer submitted a letter stating that fluency in Portuguese was a business necessity due to the fact that at least 90% of its customers and suppliers deal in the Portuguese language and that all of its workers speak Portuguese on the job. AF 83. The job duties were,

Prepare ingredients for hardcrusted bread/rolls, and other Portuguese style baked goods. Cut, mold dough into various shapes and sizes. Bakes same.

The duties of this position were encompassed by the work described by Occupational Title, "Baker," under Occupation Code No. 526.381-010 in the Dictionary of Occupational Titles (DOT).²

Notice of Findings. On December 14, 1994, the CO's Notice of Findings advised the Employer that certification would be denied, subject to rebuttal. The reason for denial was the CO's finding that Employer's requirement of fluency in the Portuguese language was unduly restrictive for the position and that the Employer must either provide evidence supporting its business necessity for the language requirement or delete that requirement and conduct a new recruitment.

The CO instructed the Employer to submit the types of documents that the employee will be using that require him to speak Portuguese. In addition, the employer was directed to establish its business necessity for foreign language fluency in Portuguese by producing the following evidence: (1) The total number of customers and others that the employer deals with and the percentage of the people that the employer deals with who cannot communicate in English. (2) Identify

²Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

the specific nature of the employer's business and the percentage of the business that is dependent upon the language. (3) Document and describe how the absence of the language would adversely impact the Employer's business. (4) Provide the percentage of working time a worker would use the language by necessity rather than choice. (5) Describe how the employer has dealt with and handled Portuguese speaking clients previously or is currently handling this segment of business. (6) Describe services provided by the employer to other ethnic groups and how the language problem is handled. (7) Furnish any other documentation that clearly shows fluency in Portuguese to be essential to the employer's business. AF 70-72.

Rebuttal. The Employer's rebuttal Addressed all of the listed questions in summary form at AF 35-36 and attached fourteen pages of a telephone directory listing Portuguese commercial, professional, and other business establishments in the United States.³ Employer reiterated that ninety percent of its customers do their business by speaking Portuguese and added that all of this business would be lost to Employer's competitors, where Portuguese is spoken, if Employer did not speak Portuguese. Employer's owner said the approximately ten percent of its customers who are English speaking are served by "myself and bilingual employees, who speak English and Portuguese." Employer added that on the job its entire workforce speaks Portuguese among themselves, as well as with the owners of the business and the customers. AF 34-66.

Final Determination. The CO denied certification in a Final Determination issued January 23, 1995. Denial was based upon the finding that the Employer's proof of the business necessity of its foreign language requirement was not persuasive. Citing Employer's comment that the ten percent of its customers who were English speaking were served by the owner and bilingual employees, the CO concluded that it was conceivable that the bi-lingual employer and bi-lingual workers could give the work and emergency instructions in English to a worker employed as a baker who would not be required to have any contact with customers. The CO concluded for this reason that the minimum requirement of Portuguese is a personal preference rather than a business necessity and not a true minimum requirement for the position. AF 31-33.

Appeal. The Employer filed a Motion to Reconsider the denial determination in which further arguments were made in support of certification. AF 24-27. The Employer stressed that the baking shift works from 12:00 midnight to 8:00 a.m., when the bakery opens to the public. For this reason, the Employer and other English speaking employees (the counter staff) are not available to deal with emergencies and other problems. Employer said, "As Portuguese is the

³The rebuttal was submitted in duplicate and is found at AF 34-66 altogether.

language of operating our business, it is essential that all employees speak Portuguese, just as other Portuguese bakeries do."

The request for reconsideration was denied by the CO on March 2, 1995, whereupon Employer timely requested a review and thereafter filed a Brief on Appeal. AF 01-03.

Discussion

Unless adequately documented as arising from business necessity, the criteria for the position at issue cannot include requirements for a language other than English under 20 CFR § 656.21(b)(2)(i)(c). To establish business necessity under this regulation the Employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of Employer's business and are essential to perform, in a reasonable manner, the job duties as described by the Employer. **Information Industries, Inc.**, 88-INA-82 (Feb. 8, 1989)(en banc). Considered in the context of a foreign language requirement, the first element of proof requires the CO to consider whether Employer's business includes clients, co-workers or contractors who speak a foreign language, and what percentage of the employer's business involves the foreign language. The second element of proof focuses on whether the employee's job duties require communicating or reading in a foreign language.

While we conclude that Employer has established that ninety percent of its customers speak Portuguese and that its workforce communicates in Portuguese, the evidence of record is insufficient to demonstrate that the prospective employee's job duties as a baker would require the worker to communicate in Portuguese. This aspect of the issue is material because BALCA has on several occasions found business necessity where the foreign language is used by the workforce, and where use of the foreign language is essential to the performance of the job duties in a reasonable manner. **Coker's Pedigreed Seed Co.**, 88-INA-48 (Apr. 19, 1989)(en banc)(the job duties included teaching employees new job skills).⁴ This Employer has not demonstrated such necessity, however. While Employer said its baking recipes are generally in Portuguese, it did not provide a reason why they could not be translated into English.

Moreover, the Employer's rebuttal acknowledged that the owner and other workers are bi-lingual and could communicate with English-speaking clientele. Because of this and because speaking Portuguese is not essential to the performance of the job duties of a baker, we

⁴Also see **Young Cleaners**, 88 INA 361(June 28, 1989), where the employee was link between customers and non-English speaking employees; **Golden City Chinese Restaurant**, 89 INA 176(Jan. 4, 1990), where restaurant manager had to communicate constantly with the staff in Chinese; and **Hollytron**, 88 INA 316(Sept. 28, 1989), which concerned a sales manager position where a substantial percentage of employees were Korean.

agree with the CO's finding that the requirement of fluency in the Portuguese language is a personal preference of the Employer, rather than a business necessity. Accordingly, we conclude that Employer's application for certification under the Act and regulations was properly denied and the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

CASE NO. 95 INA 486

COLUMBIA BAKERY, Employer
MANUEL MARUJO CASANOVA, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

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	:	CONCUR	:	DISSENT	:	COMMENT	:
	:		:		:		:
Holmes	:		:		:		:
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Huddleston	:		:		:		:
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Thank you,

Judge Neusner

Date: July 2, 1997